BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DALE O. SPANGLER (Deceased)	)	
Claimant	)	
VS.	)	
	)	Docket No. 225,908
GOODYEAR TIRE & RUBBER COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent requests review of the September 10, 2004 Award entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on February 8, 2005.

APPEARANCES

Terry E. Beck of Topeka, Kansas, appeared on behalf of claimant's minor child, William P. Spangler. Steven J. Quinn of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award. During oral argument to the Board, the parties agreed that the record should also contain the December 9, 2003 deposition of Charles W. Ratterree. A copy of that transcript was provided to the Board by the parties with the stipulation that it should be considered.[1]

ISSUES

The ALJ found that Mr. Spangler's accident arose out of and in the course of his employment and awarded his minor child benefits according to K.S.A. 44-510b.

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[1] The original Ratterree Deposition was filed with the Division of Workers Compensation on February 23, 2005.

Respondent argues that Mr. Spangler had removed himself from the course and scope of his employment for respondent when he went on the roof where he fell to his death through a skylight of Plant 2 of respondent's Topeka facility and that his death did not arise "out of" his employment.

Counsel for claimant contends that he has shown the accidental death of Dale O. Spangler to be compensable and it arose out of and in the course of the worker's employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dale O. Spangler was a maintenance worker with respondent at the plant in Topeka. Decedent was initially hired as a temporary worker in approximately October 1995 as an earth mover tire builder.[2] He then was placed as a temporary maintenance worker and after a period of time worked into a permanent maintenance position with respondent. He worked the 3:00 to 11:00 p.m. shift with three breaks, which were generally at five o'clock, seven o'clock and nine o'clock. Decedent was assigned to work with a more experienced co-worker, Charles Ratterree. As decedent was considered a "new hire" part of Mr. Ratterree's responsibilities included showing decedent how to repair equipment. On July 21, 1997, at approximately 9:00 p.m., decedent and Mr. Ratterree were taking a break from their maintenance jobs on the second shift at the plant and had gone to another building to cool off, and watch the sunset.[3] Although they had finished the scheduled jobs they had been assigned, they were still on the clock and were subject to being given further work instructions.[4] However, they were not issued walkie talkie radios and since they were taking their break in an unauthorized area without the knowledge of their supervisor, nobody would have known how to or been able to reach them.

Although they had gone to the Plant 2 building to take a break, while they were there Mr. Ratterree showed decedent that there were spare parts and there was an extra swab down machine located on the first floor of that building. While there Mr. Spangler suggested they go up to the roof of the building to cool off and watch the sunset. Decedent and Mr. Ratterree were standing near the center of the roof section when decedent walked over to an opaque plastic skylight to sit down. Mr. Ratterree made a comment to the effect, "don't fall" and turned back around to watch the sun.[5] Mr. Ratterree then heard a noise of

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[2] Nase Depo. at 14.

[3] Robbins Depo. at 39.

[4] Vilander Depo. at 43 and 44.

[5] Ratterree Depo. at 13 (Dec. 9, 2003).

the skylight cracking and turned around to see decedent had fallen though the skylight that had broken under his weight. Decedent fell approximately seventy feet to his death.[6]

Mr. Ratterree admitted in his March 26, 1998 deposition, that when he initially reported the accident he did not report that he had been on the roof of Plant 2 out of "fear of getting in trouble or job jeopardy for being someplace I should not have been."[7] Upon the first response team's arrival to the scene, Mr. Ratterree acknowledged he had given false statements to them regarding the accident and that he had told them "I wasn't on the roof," [or] something to that effect."[8] Mr. Ratterree also testified that he told them he was not on the roof because, "I was afraid of maybe being fired for being where I shouldn't be."[9] Mr. Ratterree testified:

> Q (Mr. Carpinelli) Do you know if you told this person on the first response team that you did not know how this accident took place?
>
> A. (Mr. Ratterree) Yes. I told several people that.
>
> Q. But, in fact, you did know how it happened?
>
> A. Yes, pretty much.
>
> Q. Do you remember talking to the guy previously mentioned named Brent Jordan?
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> A. Yes.
>
> Q. Do you know if you gave a statement to Brent Jordan?
>
> A. Yes.
>
> Q. Do you know what you would have told Mr. Jordan?
>
> A. Yes.
>
> Q. Can you tell me what you told Mr. Jordan?
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> A. I was still in the break room. I told Brent Jordan that Dale Spangler said he had to use the restroom. I didn't see him for some time. I heard a noise like a cat

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[6] Vilander Depo. at 32.

[7] Ratterree Depo. at 32 (March 26, 1998).

[8] *Id.* at 38.

[9] *Id.* at 39.

> screeching - - lovely story. I went out to investigate, hollered for Dale Spangler, no answer. I found Dale Spangler.
>
> Q. And stop me if I'm wrong. Is the reason you told Brent Jordan that particular story out of fear that you might be discharged or disciplined for being on the roof of plant two.
>
> A. Yes. [10]

In Mr. Ratterree's December 9, 2003 deposition, he further explained his reasons for giving the false story:

> Q. (Mr. Beck) As I understand it you gave the false statements that you had about what happened because of some fear of being disciplined, is that a true statement?
>
> A. (Mr. Ratterree) Yes. I was afraid of job jeopardy. I knew we shouldn't have been on the roof.
>
> Q. Okay. Did Dale know you were not supposed to be on the roof?
>
> A. I don't know. He - - there's - - well, I don't know if he knew or not. There is a form you sign when you're hired I believe, you go to safety training. And I believe in that they tell you you're not supposed to be on the roofs unless you're on the job that you're assigned to.[11]
> . . . .
>
> Q. (Mr. Quinn) Were you concerned that you might be terminated for having been up on the roof when this horrible thing happened?
>
> A. (Mr. Ratterree) Yes, because it was so serious an accident.
>
> Q. So at least at that point you were willing to lie to save your job?
>
> A. Yes.[12]

Mr. Ratterree also testified in his December 9, 2003 deposition about their safety training:

> Q. (Mr. Quinn) So with respect to going up on the roof, is that general knowledge that you had to have authorization to go on the roof?

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[10] *Id.* at 40 and 41.

[11] Ratterree Depo.at 19 (Dec. 9, 2003).

[12] *Id.* at 35.

A. (Mr. Ratterree) It's in the safety training.[13]

. . . .

Q. (Mr. Beck) You referred to some safety training that you received and that's where you learned about not going up on the roof?

A. (Mr. Ratterree) Yes.

Q. But would that have been as a new hire when you got the safety training or when would that have been?

A. That would have been as a new hire and multiple times.[14]

Respondent had an established policy against employees accessing the roof of the factory or warehouse. The policy was contained in its Factory General Letter No.2 (Revision).[15] The notices are placed throughout the factory on the bulletin boards and are supplied to the union. They are also supplied to the salaried staff members.[16] Mr. Ratterree testified in his March 26, 1998 deposition that he was given a list of rules by respondent but could not say whether Mr. Spangler had been as well.

Q. (Mr Beck) To your knowledge was Mr. Spangler aware that he was not to be on the roof?

. . . .

A. (Mr. Ratterree) I don't know if he knew the rules.[17]

Larry Robbins, was the plant manager at the time of decedent's accident. Mr. Robbins was involved in the investigation of the accident along with Mike Vilander. Mr. Robbins testified in his December 8, 2003 deposition that the roof access policy provided that no one was to have roof access without authorization. He determined from his investigation of the accident that there was no reason for either decedent or Mr. Ratterree to be on the roof.[18]

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[13] *Id.* at 34.

[14] *Id.* at 41.

[15] Nase Depo. at Ex. 4.

[16] Nase Depo. at 28 and 29.

[17] Ratterree Depo. at 70 (March 26, 1998).

[18] Robbins Depo. at 31.

Cynthia Nase is employed by respondent as the workers' compensation manager. She started working for respondent in October 1998. In her December 8, 2003 deposition, Ms. Nase testified that Factory General Letter No. 2[19] was apparently the only written policy of the plant that pertained to roof access.[20] This document states in paragraph 17, page 4, with regard to roof access:

> Employees are not to be on the Factory or Warehouse roof at any time unless specifically instructed to do so by supervision. Violation of this rule will result in POSITIVE DISCIPLINARY ACTION which may include discharge.[21]

There is a separate disciplinary policy that involves safety issues called "Positive Disciplinary Safety Policy" that is referred to in paragraphs 22-33, inclusive, of the Factory General Letter. The Positive Disciplinary Safety Policy does not address roof access.[22]

Mike Vilander who was the manager of employee benefits, safety and workers' compensation for respondent at the time of decedent's death testified that as far as he knew the only posting of a factory general letter in July 1997 would have been tacked up in the encased bulletin board. However, it only exposed the first page of the policy and paragraph 17 of the document is on page four. In addition, Mr. Vilander acknowledged that there was nothing in decedent's personal file to indicate if he had completed safety orientation. But Mr. Vilander testified that Mr. Spangler would have undergone safety training each time he changed jobs and when his status changed from temporary to permanent. Mr. Vilander also said claimant would have been advised of the roof access policy during this safety training.

> (Q) Mr. Quinn: Looking at Nace Exhibit No. 2 which is Mr. Spangler's personnel file, it would appear that during the tenure of his employment he held would that be five different positions?
>
> (A) (Mr. Vilander) Actually, it would be two positions, building U2 tires and mechanic in either a temporary or permanent situation.
>
> (Q) Would the fact that he was moving between departments as indicated on the second column from the left side of Exhibit 2, Page 1, indicate that he would have received new training when he would move from, let's say, a temporary mechanic position in Department 4110 to a temporary mechanic position in Department 3110?

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[19] Nase Depo. at Ex. 4.

[20] *Id.* at 30.

[21] *Id.* at Ex. 4.

[22] *Id.* at 4.

(A) Yes, that's correct.

(Q) Was part of the training going over the Factory General Letter No. 2 which has been identified as Nace Exhibit No. 4?

(A) That's correct.

(Q) And was part of that training also going over the rules such as in particular going up on the roof without authorization?

(A) That's correct.

(Q) And I think you indicated previously that on each of those occasions, Mr. Spangler in this case should have received some sort of safety traing from two different sources, the team union safety leader and a member of management?

(A) That's correct.

(Q) So there should have been approximately ten separate training events which would have addressed not going on the roof had the training been done properly?

(A) Ten?

(Q) Yes, meaning, for instance, in October of 1995 when he was going to build tires, he would have had a safety training meeting with a member of management and with a member of the union. Is that correct?

(A) That's possible. Sometimes those were done together, though.

(Q) At the very least, he should have gone through training at least five times. There may have been two people present training him.

(A) Yes.[23]

Mr. Vilander acknowledged that after the accident the Occupational Safety and Health Administration (OSHA) conducted an independent investigation of the work site. While respondent was not officially cited for a violation, OSHA did issue a letter with recommendations. Mr. Vilander said that OSHA's conclusion was that employees were using the roof for breaks and to make calls on cells phones but that prior to July 21, 1997 management was not aware of this problem.[24] Mr. Vilander said he was not aware of anyone taking breaks on any roofs. Similarly, Mr. Ratterree, testified that he had only seen

[23] Vilander Depo. at 50–52.

[24] *Id.* at 52 and 53.

another worker taking a break on a roof on one occasion and that was on the roof of Plant 1. He had never before seen anyone take a break on the roof of Plant 2.[25]

Daniel E. Schloetzer worked for respondent from May 1, 1950 to April 1, 1998. He was chairman of the Rubber Workers Local 307 Safety Committee. The union has since become the Steel Workers.[26] His job entailed overseeing the safety interests of the union employees for the entire plant including the distribution center. Mr. Schloetzer testified that decedent would have been re-oriented when he switched jobs from earthmover tire builder to a temporary mechanic but could not say with certainty that decedent was given safety training with each change of jobs.[27] Mr. Schloetzer did not give new hire training or departmental transfer training before July 1997. Mr. Schloetzer did testify that "[i]f management wanted to go on the roof, they either had to assign a production employee to go with them or another manager or another company in management."[28] Mr. Schloetzer testified that he was hired after decedent's accident to conduct new hire safety orientation.

Keith Cheuront was the maintenance manager in the earth mover tires department where decedent was initially hired. At the time of the accident Mr. Cheuront was a first shift worker and decedent was on second shift. As decedent was on second shift this indicated he had completed his training. Mr. Cheuront testified he was not involved in safety training for decedent. The safety department would be involved in the setup of safety training. Mr. Cheuront's duty was simply to ensure that employees received their safety training. He further testified he was not aware that employees would take breaks on the roof. However, when asked if there were any signs in Building 2 to indicate that access to the roof was limited to people who were authorized, he testified, "[n]o, I don't believe so."[29] Mr. Cheuront also testified that Mr. Ratterree was not disciplined by respondent for being on the roof on the day of decedent's accident.[30]

Only those accidents that arise out of and in the course of employment are compensable under the Workers Compensation Act.[31] For an accident to arise out of

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[25] Ratterree Depo. at 34, 81 and 82 (March 26, 1998).

[26] Schloetzer Depo. at 6.

[27] *Id.* at 14.

[28] *Id.* at 24.

[29] Cheuront Depo. at 19.

[30] *Id.* at 20.

[31] *See* K.S.A. 44-501.

employment, there must be a causal connection between the accident and the nature, conditions, obligations, or incidents of the employment.[32] The requirement that the accident occur in the course of employment relates to the time, place, and circumstances under which the accident occurred and means the accident happened while the worker was working for the employer.[33] In *Newman,* the Kansas Supreme Court held:

> The two phrases, arising 'out of' and 'in the course of' the employment, as used in our workmen's compensation act (K.S.A. 1972 Supp. 44-501), have separate and distinct meanings, they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of' employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase 'out of' the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment.[34]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case.[35] The claimant has the burden of establishing that the injury (death) to the worker occurred as a result of an accident arising out of and in the course of the worker's employment. Under the facts and circumstances of this tragic accident the requisite causal connection between the accident and decedent's work is absent. The evidence is that although Mr. Spangler's accident and death occurred at work and were due to the particular hazard of his location he was not in a place where he was authorized to be. Worker's were specifically prohibited from accessing the roof absent certain circumstances that, in this case, were not present. The record is persuasive that Mr. Spangler had received training to this effect and therefore knew he should not have gone onto the roof when he did. Moreover, the roof was not only a place where claimant should not have been, but it also made him unavailable to his supervisor, contrary to respondent's policy. As such, in going onto the roof claimant effectively abandoned his employment. The Board must conclude that Mr. Spangler's accident did not arise out of the employment. [36]

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[32] *See Newman v. Bennett,* 212 Kan. 562, 512 P.2d 497 (1973); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980); and *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[33] *See Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197, 198, 689 P.2d 837 (1984).

[34] *Newman*, 212 Kan. 562 at Syl. ¶ 1; *See also, Angleton v. Starkan, Inc.,* 250 Kan. 711, 82 P.2d 933 (1992).

[35] *Id.* at Syl.¶ 3, citing *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966).

[36] *See Hoover v. Ehrsam Company*, 218 Kan. 662, 544 P.2d 1366 (1976); *Fairchild v. Prairie Oil & Gas Co.,* 138 Kan. 651, 27 P.2d 209 (1933).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the September 10, 2004 Award entered by Administrative Law Judge Bryce D. Benedict should be, and is hereby, reversed and benefits are denied.

IT IS SO ORDERED.

Dated this ____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry E. Beck, Attorney for William Paul Spangler
Steven J. Quinn, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director